

executing a valid and registrable transfer of the disputed property free from all encumbrances to the plaintiff or her nominee and failing their doing so, then the senior assistant registrar of this court be authorized to do so on their behalf;

- (3) that upon payment of the balance of the purchase price as aforesaid, the second and the third defendants do deliver or cause to be delivered to the plaintiff or her solicitors the issue document of title relating to the disputed property;
- (4) that the costs of this action be paid by the defendants to the plaintiff.

Order accordingly.

Solicitors: *Darshan Singh & Co, Gan Teik Chee & Ho; Tan Beng Hong & Co.*

Reported by *Yap Shao Sin*

Moscow Narodny Bank Ltd v New Kok Ann Realty Sdn Bhd

HIGH COURT (JOHORE BAHRU) - ORIGINATING
SUMMONS NO 116 OF 1982
LC VOHRAH J
1 JUNE 1989

Land Law - Foreclosure - Third party charge - Non-payment of loan - Borrower went into liquidation - Defendant chargor resisting foreclosure - Whether charge bad for failure of consideration - Whether charge void for past consideration - Whether Form 16E correct statutory notice - National Land Code, ss 255, 256 & 257.

This is an application by the plaintiff under s 256 of the National Land Code 1965 ('the Code') for 11 pieces of land belonging to the defendant and charged to the plaintiff to be sold for non-payment of a loan granted to a third party. The plaintiff granted a loan of \$3,000,000 to Mosbert Finance (Hong Kong) Limited known subsequently as Mosbert Acceptance Limited ('Mosbert') on the security of the said 11 pieces of land. Mosbert defaulted in repaying the loan and eventually went into liquidation. In consequence the plaintiff through its solicitors sent out a statutory demand in Form 16E pursuant to s 55 of the Code but no repayment was made. The loan was actually granted to Mosbert in five instalments in 1972 between 8 September and 11 October. By a resolution passed on 30 August 1972 the defendant decided to charge the said pieces of land to the plaintiff. The charge was executed on 11 January 1973 in favour of the plaintiff after the said pieces of land which were charged to Public Finance Bhd had been discharged. Five issues have been identified by counsel for the defendant for the consideration of the court:

- (1) whether the said pieces of land charged can be foreclosed to recover sums allegedly paid to Mosbert;
- (2) whether the charge is bad for a failure of consideration;
- (3) whether the charge is void for past consideration if it covers loans given to Mosbert;

- A (4) whether the statutory notice in Form 16E was the correct one to have been used; and
- (5) whether interest at the rate claimed is recoverable after 20 February 1976 or 24 May 1976 as the case may be.

Held, allowing the application:

- (1) With regard to the first three issues, the learned judge found that the annexure to the charge forms an integral part of the charge. From the provisions of the annexure and the surrounding circumstances it is clear that the defendant agreed to create the charge in order to secure the loan that was to be granted to Mosbert by the plaintiff. It is also clear that the defendant must have executed the charge on 11 January 1973 pursuant to the directors' resolution passed on 30 August 1972 to charge the said lands to the plaintiff to secure the loan in favour of Mosbert. The delay in the execution of the charge was explained by the undisputed fact that the said pieces of land at the material time were still charged to Public Finance and had to be discharged before they could be recharged to the plaintiff. It is obvious therefore that although the five instalments of the loan were granted to Mosbert before the charge was formally executed on 11 January 1973 and registered on 10 April 1973 the charge was in fact agreed to be created for the specific purpose of securing the loan for the benefit of Mosbert, the principal debtor, before any part of the loan was released. The charge is accordingly not void merely because the sums were actually paid to Mosbert although the charge itself described the receipt of the loan sum to have been acknowledged by the defendant. There was no failure of consideration.

- E (2) Although cl 1 of the charge annexure provided for the repayment of the loan within one year, that fact alone did not make the facility a term loan as such. When that period elapsed the plaintiff was entitled to avail itself of cl 2 which imposed an obligation on the defendant to pay the plaintiff on demand. The two clauses do not contradict but complement each other. They operated to allow repayment within one year subject to the bank's overriding right to demand repayment at any time. Accordingly it was in order for the plaintiff to have used Form 16E in this case.

- (3) With regard to the issue of interest, no notice of variation of interest was sent either to the defendant or Mosbert. There has been no evidence or allegation that any interest had been improperly imposed by the plaintiff and it is also not disputed that at the time when the notice of demand dated 20 February 1976 was given, Mosbert was already in liquidation and its affairs were managed by the official receiver of Hong Kong so that no purpose would have been served if the notice of variation of interest had been sent either to Mosbert or the defendant. In the absence of fraud, by virtue of cl 2 of the charge annexure which stated 'the statement of the manager assistant manager sub manager accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive', the defendant cannot now argue that the amount stated by the plaintiff as being due is not correct.

- (4) As the total amount due to the plaintiff was not available on that day the learned judge adjourned the matter for the making of the appropriate order for sale under s 257(1).

[Editorial Note: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-238 of 1989.]

Cases referred to

- 1 *Chai Yen v Bank of America National Trust & Savings Association* [1981] 2 MLJ 141 (refd)
- 2 *Co-operative Central Bank Limited v G Visvanathan s/o Govindasamy & Ors* [1987] 1 CLJ 390 (refd)

- 3 *Eliathamby v Sheikh Mohamed bin Said* [1970] 2 MLJ 194 (refd)
4 *Jacob v Oversea-Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161 (folld)

Legislation referred to

National Land Code 1965 ss 255, 256, 256(3), 257(1).

G Lakshmi (Edward Yong with him) for the plaintiff.
KS Narayanan for the defendant.

Cur Adv Vult

LC Vohrah J: This is an application by way of originating summons on the part of the plaintiff under s 256 of the National Land Code for 11 pieces of land belonging to the defendant and charged to the plaintiff to be sold for non-payment of a loan granted to a third party.

The facts briefly stated are as follows. The plaintiff granted a loan of \$3,000,000, the equivalent at the material time of US\$1,125,000, to Mosbert Finance (Hong Kong) Ltd known subsequently as Mosbert Acceptance Ltd ('Mosbert'). As security for this loan the defendant charged the said pieces of land to the plaintiff. Mosbert defaulted in repaying the loan and eventually went into liquidation resulting in its affairs being taken over by the official receiver of Hong Kong. In consequence the plaintiff through its solicitors sent out a statutory demand in Form 16E pursuant to s 255 of the Code but no repayment was made. Hence the present application.

Section 256(3) of the Code provides that in an application such as the present one 'the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary'. I agree with counsel for the plaintiff that the burden is upon the defendant to show cause as to why an order for sale should not be made. From the contentions that have been raised in the affidavits, five issues have been identified by counsel for the defendant, with the agreement of counsel for the plaintiff, for the consideration of the court. They are as follows:

- 1) whether the said pieces of land charged can be foreclosed to recover sums allegedly paid to Mosbert;
- 2) whether the charge is bad for a failure of consideration;
- 3) whether the charge is void for past consideration if it covers loans given to Mosbert;
- 4) whether the statutory notice in Form 16E was the correct one to have been used; and
- 5) whether interest at the rates claimed is recoverable after 20 February 1976 or 24 May 1976 as the case may be.

As the first three issues are interconnected I shall proceed to deal with them together. I find the following facts undisputed in regard to the three issues. The loan was actually granted to Mosbert in five instalments in 1972

between 8 September and 11 October (see encl 13, exhs A1-A5). Mosbert at all material times was the beneficial owner of 40% of the total issued shares of the defendant. By a resolution passed on 30 August 1972 the defendant decided to charge the said pieces of land to the plaintiff (see encl 29, exhs TCC-2 and TCC-3). The charge was executed on 11 January 1973 in favour of the plaintiff after the said pieces of land which were charged to Public Finance Bhd had been discharged. The demand for repayment in Form 16E was received by the defendant in May 1976 but no repayment was made. No objection was taken by the defendant to the charge until 16 September 1979 when the defendant filed a suit against the plaintiff in Johore Bahru Civil Suit 294 of 1979 praying for a declaration that the charge was void and unenforceable but the suit was struck out for want of prosecution on 24 November 1986. The persons who were directors of the defendant at the time when the resolution was passed are no longer the directors of the defendant.

Now to the facts in issue. The body of the charge reads:

We, New Kok Ann Realty Sendirian Berhad, a company incorporated in Malaysia and having our registered office at 3rd Floor, UMNO Building, Jalan Segget, Johore Bahru, Johore (hereinafter called 'the chargor(s)') being proprietor(s) of the land(s) described in the schedule below (hereinafter called 'the said land(s)'):

For the purpose of securing -

- a) the repayment to the chargee named below, with interest, of a loan of \$3,000,000 (Dollars Three Million (Malaysian)) only the receipt of which we hereby acknowledge;

Hereby charge the said land(s) with the payment to the said chargee of the said sum and interest thereon in accordance with the provisions annexed hereto.

Counsel for the defendant contends that because the body of the charge states that the defendant had acknowledged receipt of the loan whereas the evidence clearly showed that Mosbert had received the total sum of \$3,000,000 the charge is bad for failure of consideration. Counsel for the plaintiff however points out that the body of the charge stipulates that the said lands were charged in accordance with the provisions of the Annexure and they must be taken into account. The relevant provisions read as follows:

1 The chargors and/or Mosbert Finance (Hong Kong) Limited will repay the said sum of Dollars Three Million (\$3,000,000) within one year from the date hereof and interest at the rate as mention (sic) in cl 2 below.

1(a) It is hereby agreed and declared that this charge and the charge of even date with these presents executed by Lim Eng Teck and the bank in respect of the lands thereinmentioned are instruments employed in one transaction to secure the principal sum of Malaysian Dollars three million (\$3,000,000) only with interest thereon within the meaning of s 4(3) of the Stamp Ordinance 1949 and for the purpose of the said s 4(3) this charge is deemed to be the principal instrument.

...

is/are included in and form(s) part of the aforesaid charge.

2 The chargor(s) will on demand pay to the bank all sums of money which are now or shall from time to time or at any time hereafter be due or owing by the chargor(s) and/or Mosbert Finance (Hong Kong) Limited hereinafter called 'the borrower(s)' solely or jointly with any other persons firms or companies and whether as principal or surety or which the chargor(s)/borrower(s) may be or become liable to the bank anywhere on banking account or any other accounts current or otherwise or in any manner whatsoever including the balance for the time being owing for or in respect of cheques bills notes drafts or other negotiable instruments accepted paid or discounted for and on behalf of the chargor(s)/borrower(s) either alone or jointly with another or others or for any other payments loans credits or advances made to or for the use or accommodation or on behalf of the chargor(s)/borrower(s) whether alone or jointly with another or others pursuant to or in respect of or under any guarantee or letter of credit given established or opened by the bank for the chargor(s)/borrower(s) or any contracts for the forward delivery of goods bills or specie or in respect of any other banking facilities whatsoever whether or not given upon or under any trust receipts or other security whatsoever or otherwise howsoever up to an aggregate sum of dollars three million (\$3,000,000) only for principal... together with interest thereon at the rate of eight and a half per centum (8 1/2%) pa or at such other rate or rates as may be imposed by the bank from time to time with monthly rests (hereinafter referred to as the 'prescribed rate' which expression shall wherever the context so permits include any and such other rate which the bank at any time and from time to time may stipulate in the manner hereinafter appearing) commission discount and all other banking charges and all costs charges and other expenses which the bank charge in respect of any of the matters aforesaid or which the bank may pay or incur in registering this charge or in perfecting the present security or in enforcing or obtaining payment of such moneys or in paying any expenses or outgoings whatsoever in respect of or in insuring repairing maintaining managing or realizing the said land and or any buildings fixtures crops or plants thereon or in defending prosecuting or otherwise howsoever taking part in or attending at (whether on a watching brief as observer or otherwise howsoever) any action enquiry hearing suit or other proceedings whatsoever affecting the said land or any buildings fixtures crops or plants and also all other payment and sums hereinafter mentioned or stipulated and other usual bankers' charges.

And if when the said account or accounts current or otherwise shall be closed either by demand as aforesaid or by the death of chargor(s) (or where the chargor(s) shall be more than one person by the death of any one of them) a balance shall be owing to the bank by the chargor(s)/borrower(s) the chargor(s) or the personal representatives of the chargor(s) as the case may be will so long as the same or any part thereof shall remain owing pay to the bank interest thereon at the prescribed rate with monthly rests computed from the time when such balance shall have been ascertained and the chargor(s) agree(s) that the statement of the manager assistant manager sub-manager accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive. (Emphasis added).

In my view the annexure to the charge forms an integral part of the charge. I find support for this view in the statement of Abdoolcader J (as he then was) in *Chai Yen*

A v *Bank of America National Trust & Savings Association*¹ at p 143:

The fact that it [the annexure] is not signed by the parties does not affect its validity or that of the charge as the charge itself effected by an instrument in Form 16A prescribed under s 242 of the Code expressly provides for the charge to be in accordance with the provisions annexed thereto. There is no mandatory requirement in the Code for the execution of the annexure to a charge and in any event on an application of the maxim 'verba relata hoc maxime operantur per referentiam ut in eis inesse videntur' (words to which reference is made in an instrument have the same operation as if they were inserted in the clause referring to them), it must be considered to be the same thing as if the terms of the annexure referred to in the charge had been actually inserted in the charge itself, since it was, by operation of this principle, incorporated with it (*Llewellyn v Earl of Jersey* (1843) 12 LJ Ex 243 (at 246), *Lyle v Richards* (1866) LR 1 HL 222, *Barton v Dawes* 10 CB 261 (at pp 263, 266)).

Further in the words of Edgar Joseph Jr J in *Co-operative Central Bank Limited v G Visvanathan s/o Govindasamy & Ors*² (at p 393), 'As in the case of guarantees or indeed any other contract, the [c]harge must be construed reasonably having regard to the surrounding circumstances.' From the provisions of the annexure and the surrounding circumstances it is clear that the defendant agreed to create the charge in order to secure the loan that was to be granted to Mosbert by the plaintiff. It is also clear that the defendant must have executed the charge on 11 January 1973 pursuant to the directors' resolution passed on 30 August 1972 to charge the said lands to the plaintiff to secure the loan in favour of Mosbert (see encl 29, exh TCC2). The delay in the execution of the charge was explained by the undisputed fact that the said pieces of land at the material time were still charged to Public Finance and had to be discharged before they could be recharged to the plaintiff. It is obvious therefore that although the five instalments of the loan were granted to Mosbert before the charge was formally executed on 11 January 1973 and registered on 10 April 1973 the charge was in fact agreed to be created for the specific purpose of securing the loan for the benefit of Mosbert, the principal debtor before any part of the loan was released. I am accordingly of the view that the charge is not void merely because the sums were actually paid to Mosbert although the charge itself described the receipt of the loan sum to have been acknowledged by the defendant. I cannot see how there has been a failure of consideration or that the consideration was past consideration.

The next question I have to consider is whether the correct statutory form had been used. Counsel for the defendant contends that on the authority of *Eliathamby v Sheikh Mohamed bin Said*³ the statutory notice of demand sent by the plaintiff in Form 16E was incorrect and that consequently the application for the foreclosure order should be dismissed. In my view although cl 1 provided for the repayment of the loan within one year that fact

alone did not make the facility a term loan as such. When that period elapsed the plaintiff was entitled to avail itself of cl 2 which imposed an obligation on the defendant to pay the plaintiff on demand. I agree with the submission of counsel for the plaintiff that the two clauses do not contradict but complement each other. They operated to allow repayment within one year subject to the bank's overriding right to demand repayment at any time. Accordingly I am of the view that it was in order for the plaintiff to have used Form 16E in this case: See *Jacob v Oversea-Chinese Banking Corporation, Ipoh*.⁴

I come now to the last issue for consideration. Clause 2 provided for interest to be paid on the principal 'at the rate of eight and a half per centum (8 1/2%) pa or at such other rate or rates as may be imposed by the bank from time to time with monthly rests' and cl 4 provided that 'the bank shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the chargor(s) and/or the borrower(s) such of its intention and such amended rate of interest shall be payable as from the date specified in the notice'. As it was admitted by the plaintiff's senior credit officer Tan Chee Cheong in cross-examination that no notice was sent either to the defendant or Mosbert, counsel for the defendant stated that any interest leviable could not exceed 8 1/2% pa. There has been no evidence or allegation that any interest had been improperly imposed by the plaintiff and it is also not disputed that at the time when the notice of demand dated 20 February 1976 was given (see encl 2, exh P2), Mosbert was already in liquidation and its affairs were managed by the official receiver of Hong Kong so that no purpose would have been served if the notice of variation had been sent either to Mosbert or the defendant. In any event, I am of the view that in the absence of fraud, by virtue of cl 2 'the statement of the manager assistant manager sub-manager accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive'. I agree with counsel for the plaintiff that the defendant cannot now argue that the amount stated by the plaintiff as being due is not correct.

As the total amount due to the plaintiff is not available today I would adjourn the matter to 5 June 1989 for the making of the appropriate order for sale under s 257(1).

Application allowed.

Solicitors: *SM Yong & Co; Ng Ek Teong & Partners.*

Reported by *Wong Kim Fatt*

A Anuar bin Mat Amin v Abdullah bin Mohd Zain

HIGH COURT (ALOR SETAR) - CIVIL APPEAL NO 12-21-88
KC VOHRAH J
9 JULY 1989

B *Civil Procedure - Pleadings - Negligence - Contributory negligence - Highway accident - Plaintiff substantially to blame - No allegation of contributory negligence made in pleadings or at trial - Whether claim should have been dismissed - Whether fault of plaintiff should be taken into account - Civil Law Act 1956, s 12(1)*

C The plaintiff brought an action against the defendant alleging that the defendant through his negligence had caused a highway accident as a result of which the plaintiff had suffered injuries. At the trial, the sessions court judge gave judgment to the plaintiff but held the plaintiff contributorily negligent to the extent of 70%. However, the defendant had never pleaded contributory negligence on the part of the plaintiff nor was the issue brought up by the defendant during the trial. The plaintiff appealed against the decision principally regarding the finding that he had been contributorily negligent. The defendant did not appeal or cross-appeal. In her grounds of decision given later, the trial judge conceded that since contributory negligence was not pleaded she was wrong in attributing partial liability to the plaintiff. However, she said that since the accident was substantially caused by the plaintiff she should have dismissed the claim.

E **Held**, allowing the appeal:

Since contributory negligence was not pleaded by the defendant nor brought up as an issue during the course of the trial the learned judge should not have taken into account the contributory negligence of the plaintiff. Once it was shown that there was negligence on the part of the defendant the learned judge had to disregard any fault on the part of the plaintiff.

F [Editorial Note: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-337 of 1989.]

Cases referred to

- G 1 *Fookes v Slaytor* [1979] 1 All ER 137 (folld)
2 *Taylor v Simon Carves Ltd* 1958 SLT (Sh Ct) 23 (folld)
3 *Dann v Hamilton* [1939] 1 All ER 59 (refd)
4 *Slater v Clay Cross Co Ltd* [1956] 2 All ER 625 (refd)

Legislation referred to

Civil Law Act 1956 s 12(1)
Law Reform (Contributory Negligence) Act 1945 [UK] s 1(1)

H *Brijnandan Singh Bhar* for the appellant.
Francis Nathar for the respondent.

Cur Adv Vult

KC Vohrah J: There was an accident involving two motor cycles travelling in the same direction. The judge of the sessions court, Alor Setar, gave judgment to the plaintiff. And she held that the plaintiff was contributorily negligent to the extent of 70%. But the defendant had never pleaded contributory negligence on the part of the plaintiff. Nor did the defendant bring up that issue during the course of the trial. The plaintiff was dissatisfied with the learned judge's decision principally on her finding that